

A. Any "Competitive Checklist" Used To Analyze Whether Sufficient Competition Exists To Streamline LECs or Declare Them Non-Dominant Must Be Tailored to the Local Exchange Bottleneck and Monopolistic Characteristics.

Any competitive checklist employed to identify whether streamlining of regulatory oversight of LECs is justified must be geared towards the specific structure, performance and conduct in the local exchange market.<sup>42/</sup> A competitive checklist cannot weigh only the benefits to be gained by LECs by regulatory streamlining. It is vastly more important that such a checklist incorporate sufficient and necessary baseline conditions to protect consumers and prevent harm to competitors.

The competitive checklist proposed in the Notice is deficient and incomplete in several respects. The Commission tentatively proposes the following "competitive checklist": (i) competing providers of local switched telephone service have been authorized and have become operational; (ii) local loops and switches have been unbundled; (iii) intrastate expanded interconnection is available through tariff or service contract (physical or virtual collocation); (iv) service provider number portability is available; (v) compensation arrangements have been established for the LEC and competitors to terminate calls originated on one another's networks; and (vi) competitors have access to directory assistance, 911, and other databases. Notice, at ¶ 108.

The tentative checklist is unacceptable and should not be employed for purposes of regulating LECs. In the first instance, the pending legislation's competitive checklist is

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<sup>42/</sup> See F. Scherer & D. Ross., *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 4-7 (3d ed. 1990); D. Carlton & J. Perloff, *MODERN INDUSTRIAL ORGANIZATION*, chs. 1, 9 (2d ed. 1994); J. Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION*, 1-3 (1988).

designed to determine when exemption from the MFJ's restriction on BOC entry into interLATA markets is justified, not when local exchange regulation of BOCs should be streamlined or eliminated.<sup>43/</sup> Although the local exchange market may possess the rudimentary characteristics of competition sufficient to justify BOC entry into the separate and distinct long distance market, these same baseline factors do not nearly approximate the showing necessary to justify deregulation of LECs with regard to their control over bottleneck facilities in the local exchange market.

The Notice's proposed tentative checklist fails to impose an affirmative obligation upon incumbent LECs to negotiate interconnection arrangements with competitors upon request or to require LECs to provide just, reasonable, and nondiscriminatory rates, terms and conditions of interconnection to competitors for interstate and intrastate services. The pending telecom reform legislation does impose good-faith negotiation requirements upon LECs with market power.<sup>44/</sup> These are the keys to local exchange competition.<sup>45/</sup>

Any competitive checklist must require, at a minimum, that all LECs found to possess market power provide open, nondiscriminatory and mutually compensatory co-carrier access and interconnection arrangements to their network facilities and information. The competitive checklist must also impose a duty on incumbent LECs to promote the

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<sup>43/</sup> See S. 652, Section 221; H.R. 1555, Section 245.

<sup>44/</sup> See S. 652, Section 251; H.R. 1555, Section 242.

<sup>45/</sup> See S. 652, Section 101; H.R. 1555, Section 241; *see also Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408 (1994); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Further Notice of Proposed Rulemaking, CC Docket No. 94-54, FCC 95-149 (released April 20, 1995).

nondiscriminatory availability to competitors of LEC rights-of-way. Finally, the paradigm must establish number portability and dialing parity among incumbent LECs and competitors.

In addition, any interconnection agreements negotiated between LECs and new entrants must provide for interconnection with the LEC's network used to provide telephone exchange service on the trunk side of any switch, where technically feasible on just, reasonable and non-discriminatory cost-based rates, terms and conditions. The Commission must also establish that LEC interconnection rates provide mutual and reciprocal recovery of each carrier's costs associated with termination of one another's traffic. At least during an interim period until new entrants obtain a foothold in the local exchange market, mutual compensation must be based on the bill-and-keep model of compensation.<sup>46/</sup>

Only when the conditions described in the above checklist are met will the Commission be able to ascertain that streamlining of LEC regulations will not cause

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<sup>46/</sup> See *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision, 95-07-054, R.95-04-043 (California Public Utilities Commission, released July 25, 1995); *Unbundling of the Southern New England Telephone Company's Local Telecommunications Network* (Connecticut Department of Public Utility Control, May 1995); *Washington Util. & Transportation Comm'n v. U S West Communications, Inc., et al.*, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, In Part, Docket Nos. UT-941464, UT-941465, UT-950146, and UT-950265 (Washington Utilities and Transportation Commission, adopted October 31, 1995); see also Gerald W. Brock, *Incremental Cost of Local Usage*, filed on behalf of Cox Enterprises, Inc., in CC Docket No. 94-54 (March 16, 1995); Gerald W. Brock, *Interconnection and Mutual Compensation With Partial Competition*, attached to Comments of Comcast Corporation, Appendix, in CC Docket No. 94-54, at 24 (filed September 12, 1994); Gerald W. Brock, *Price Structure Issues in Interconnection Fees*, prepared on behalf of Teleport Communications Group (March 30, 1995).

anticompetitive harm to competing LECs. Absent a guarantee to new entrants that just, reasonable and non-discriminatory access to incumbent LEC's monopoly networks be made available, incumbent LECs will be able to exert market power over bottleneck facilities to exclude competition at whim. In such circumstances, deregulation of incumbent LECs for meeting the Notice's proposed "competitive checklist" would only increase LEC incentives to abuse their existing market power to the detriment of rival local exchange service providers.

B. Granting LECs Non-Dominant Status Under Current Circumstances Will Produce Rates That Violate the Communications Act.

The Notice's proposal to declare LECs non-dominant is entirely premature. Unlike the change in the position of AT&T and competitors in the long distance market upon which the Commission premised its decision to declare AT&T non-dominant, no similar fundamental shift has occurred in the local exchange market. If LECs are completely deregulated as "non-dominant" prior to the establishment of the necessary market conditions, they will be able to engage in pricing discrimination, cross-subsidization and other anticompetitive practices unchecked by regulators. The Commission's proposal to define LECs as non-dominant thus will lead to anticompetitive results.

By wielding market power, LECs may charge unjust, unreasonable and discriminatory rates. Requiring monopolists to justify their rates thus is imperative.<sup>47/</sup> If

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<sup>47/</sup> It is well-settled that forbearance from regulation is justified only if unnecessary to ensure just, reasonable and nondiscriminatory rates, terms and conditions of service. See 47 U.S.C. § 332(c)(1)(A); *see also* S.652, Section 260; H.R. 1555, Section 230.

LECs are granted non-dominant status, there will be no backstop to ensure that rates are reasonable.

However, in *Competitive Carrier*, the Commission declared MCI and other specialized common carriers as non-dominant in the provision of private line services because AT&T's monopoly presence was a backstop to any anticompetitive rates MCI and others might charge. The Commission found in *Competitive Carrier* that specialized common carriers are non-dominant and so outflanked by AT&T monopoly facilities that "AT&T's rates constitute an umbrella price [and in comparison] the rates charged by [specialized common carriers] are clearly constrained."<sup>48/</sup> All carriers not possessing market power were classified as non-dominant and placed under a streamlined regulatory regime. The economic underpinning of the Commission decision to establish a presumption of lawfulness for non-dominant carrier rates was a belief that firms lacking market power could not rationally price their services in ways that would contravene the reasonableness and nondiscrimination provisions of the Act.<sup>49/</sup>

Not only would declaring LECs with market power non-dominant fail to provide a backstop against anticompetitive rates, as was the case in *Competitive Carrier*, the conditions in the local exchange market do not nearly approximate the competitive conditions in the long distance market that had to exist before AT&T was recently declared non-dominant. The Commission's decision to declare AT&T non-dominant was premised on the following findings with regard to the long distance market: (i) AT&T's

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<sup>48/</sup> See 85 F.C.C.2d at 28-9.

<sup>49/</sup> See 85 F.C.C.2d at 31.

overall market share from 1984 to 1994 has fallen from approximately 90 percent to 60 percent; (ii) AT&T had not controlled local bottleneck facilities for over ten years; and (iii) AT&T now faces at least two full-fledged facilities-based competitors, MCI and Sprint Corporation ("Sprint"), with nationwide networks capable of offering most consumers an alternative choice of services relative to AT&T.<sup>50/</sup>

Over the same period of time since divestiture that the long distance market was going through a competitive sea change, the local exchange market has remained virtually static into the present day. LECs still wield over 90 percent of the local access market.<sup>51/</sup> In addition, LECs still remain in undisturbed control of local loop bottleneck facilities.<sup>52/</sup> Competing local exchange service providers such as CAPs, wireless service providers and potentially cable operators have not reached the build-out and operational phases in the local exchange market that even begin to approximate the strong rivalry well-established by Sprint and MCI.

In sum, granting LECs non-dominant status is putting the cart before the horse. The local exchange market does not have a competitive backstop to prevent LECs with market power from charging anticompetitive rates, upon being declared non-dominant. Nor has the local exchange market reached the stage of competitive maturity that exists in the long distance market sufficient to find that the LECs, like AT&T, no longer are dominant.

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<sup>50/</sup> See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-247, at ¶¶ 67-72 (released October 23, 1995).

<sup>51/</sup> See *1995 Competition Report*, at note 10, *supra*.

<sup>52/</sup> See *id.*

C. Streamlining Price Cap Regulation for Dominant LECs Will Have Anticompetitive Effects

Increasing LEC pricing flexibility will encourage anticompetitive cross-subsidization and discriminatory pricing. The Commission must preserve the existing system of competitive safeguards under price cap regulation to prevent LECs from exploiting market power to the detriment of new entrants. The Commission should reject the Notice's proposals to streamline price cap regulations regarding LEC new services, individual case basis tariffs and alternative pricing plans.

Competitive conditions in the local exchange market do not justify any changes to the new services test. The Notice's proposal to reduce notice periods and costing information with regard to LEC new services will cut off any meaningful public debate regarding LEC new services rates.<sup>53/</sup> Streamlining the new services test will also eviscerate its very purpose — to prevent unjust or unreasonably discriminatory rates from being incorporated into a LEC's price cap indices.<sup>54/</sup> By extension, streamlining the new services test will also undermine a fundamental premise of price cap regulation — that the rates used to set the price cap indexes are reasonable.<sup>55/</sup>

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<sup>53/</sup> See Notice, at ¶¶ 39-53.

<sup>54/</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6825-6 (1990) ("*LEC Price Cap Order*"), *recon.*, 6 FCC Rcd 2637 (1991) ("*LEC Price Cap Reconsideration Order*"), *aff'd sub nom.*, *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

<sup>55/</sup> See *id.*

The Commission must reject the Notice's proposed streamlining of LEC individual case basis ("ICB") offerings.<sup>56/</sup> Including ICB offerings under price caps would undermine existing competitive safeguards. ICB pricing must be based on "competitive necessity" test. The key element that must be proved by a carrier attempting to justify a discriminatory rate under the competitive necessity doctrine is that an equal or lower priced competitive alternative is generally available to customers of the discounted offering.<sup>57/</sup> Absent a showing that a price reduction is a competitive response to a generally available discounted offering, there is no guarantee that the ICB price is motivated by a competitive necessity, and consequently, that the LEC will not load the costs of the ICB price onto regulated ratepayers.<sup>58/</sup>

Relaxing review of alternative pricing plans ("APPs") will encourage LECs to manipulate the price cap system to engage in cost-shifting.<sup>59/</sup> Essentially discounts off an underlying service rate, APPs will invite cost-shifting by LECs if incorporated into the same price cap basket. LECs will be able to load the costs of APPs onto customers of the basic underlying service who choose not to pay the discounted APP rate. Absent

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<sup>56/</sup> See Notice, at 61-65.

<sup>57/</sup> See *Private Line Rate Structure and Volume Discount Practices*, Report and Order, 97 F.C.C.2d 923, 948 (1984).

<sup>58/</sup> See *Multimedia Hyperion Telecommunications, Opposition to Direct Case, filed in The Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal Nos. 2443 and 2449, CC Docket No. 95-140 (September 25, 1995); see also AT&T Co. Tariff F.C.C. No. 250, TELPAK Service and Channels*, Memorandum Opinion and Order, Docket No. 14251, 37 F.C.C. 1111, 1115-6 (1964), *aff'd sub nom. American Trucking Ass'n v. FCC*, 377 F.2d 121 (D.C. Cir. 1966).

<sup>59/</sup> See Notice, at ¶¶ 54-60.



competition, moreover, there will be no backstop mechanism to prevent LECs from underpricing services to exclude competitors by means of APPs

D. The Proposed Alterations to the Existing Price Cap Basket Structure and Part 69 Access Charge System Will Eliminate Safeguards Against Cross-Subsidization

The Commission must reject alterations to the price cap basket structure and Part 69 access charge system proposed in the Notice. The Notice erroneously concludes that downward, below-cost pricing flexibility is in the public interest. Below-cost pricing will only encourage LECs to engage in anticompetitive conduct. Inclusion of all LEC services in a single price cap basket will enable LECs to engage in cross-subsidization within the basket. Instituting a blanket waiver of the Part 69 access charge system will facilitate LEC anticompetitive cost-shifting.

The Notice's proposal to eliminate the service band index ("SBI") floor to "allow price cap LECs to move prices closer to cost" will encourage predatory pricing and anticompetitive cost-shifting.<sup>60/</sup> Because price cap LECs possess market power, they retain the ability to charge below cost prices to exclude competitors. At a minimum, removal of the SBI floor would facilitate LECs in imposing a price squeeze on new entrants.<sup>61/</sup> Current rules require LECs to justify rates that fall outside of the SBI. Allowing price cap LECs to charge below cost prices without regard to the SBI floor thus would allow LECs

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<sup>60/</sup> See Notice, at ¶ 83.

<sup>61/</sup> See A. Areeda & D. Turner, ANTITRUST LAW, at sec. 728(c)(5) (1978).

to engage in predatory pricing or anticompetitive cost-shifting without being subject to prior public scrutiny.<sup>62/</sup>

Inclusion of all LEC services in a single price cap basket will enable LECs to engage in cross-subsidization within the basket.<sup>63/</sup> The Commission initially established several price cap baskets to prevent LECs from cross-subsidizing competitive services through non-competitive services by placing like services in the same basket.<sup>64/</sup> If disparate services are placed in the same basket, notwithstanding the Notice's proposal to eliminate the sharing adjustment, LECs will be able to subsidize competitive services by virtue of their being averaged into the PCI with non-competitive services.

The Commission must reject the Notice's proposal to allow price cap LECs to introduce a new rate element into its switched access services without obtaining a waiver of the Part 69 access charge rules.<sup>65/</sup> The Part 69 access charge rules are designed to allocate the appropriate access revenues and costs to the relevant access charge elements so that they

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<sup>62/</sup> The Notice's proposal to shift the burden of proof for justifying a below-band rate reduction from the LEC to competitors is unconscionable. Requiring competitors to challenge a below-cost rate reduction, without a prior duty on the LEC to meet minimum cost justification requires, imposes an impossible burden upon petitioners. The current FCC tariffing procedures leave the complaint process too long and uncertain. The Notice's proposal also is set up in a manner that will discourage competitors. *See* Notice, at ¶ 83.

<sup>63/</sup> *See* ¶ 90.

<sup>64/</sup> *See* LEC Price Cap Order, 5 FCC Rcd at 6811; *see also* Price Cap Performance Review for Local Exchange Carriers, Notice of Proposed Rulemaking, CC Docket No. 94-1, 9 FCC Rcd 1687, 1694 (1994); *see also* Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, Second Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 94-1, FCC 95-394 (released September 21, 1995).

<sup>65/</sup> *See* Notice, at ¶¶ 66-74.

are flowed-through to the appropriate price cap basket and service category.<sup>66/</sup> If LECs are freely allowed to introduce new rate elements without obtaining a waiver, there will be no public review mechanism to prevent LECs from engaging in regulatory gamesmanship to introduce anticompetitive rate elements. Furthermore, to the extent that the Commission is required to comply with Administrative Procedure Act, a blanket waiver of the Part 69 access charge rate elements cannot be adopted without good cause and a finding of pro-competitive benefit.<sup>67/</sup> Neither circumstance obtains here.

## V. CONCLUSION

Accordingly, for the foregoing reasons, Comcast respectfully urges the Commission to initiate an expeditious inquiry into the state of competition in the local exchange market. The Commission must reject the proposed regulatory relief for price cap LECs as premature, absent completion of a market inquiry. As an essential second phase of this proceeding, the Commission must establish a competitive paradigm for the local exchange market to encourage competitive new entry. As a corollary, this competitive paradigm must also prevent incumbent LECs from exploiting market power to exclude new entrants by engaging in unjust, unreasonable or anticompetitive interconnect pricing and cross-subsidization.

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<sup>66/</sup> See 47 C.F.R. Part 69.

<sup>67/</sup> See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); see also 47 C.F.R. § 1.3; *Ameritech Operating Companies; Petition for Waiver of Section 69.4(b) of the Commission's Rules*, Memorandum Opinion and Order, 6 FCC Rcd 1541, 1542 (Com. Car. Bur. 1991); *Sierra Tel. Co., Inc., et al.; Petitions for Waiver of Part 69*, Memorandum Opinion and Order, 7 FCC Rcd 3771, 3772 (Com. Car. Bur. 1992).

Only when a competitive paradigm is established in the second phase of this proceeding will the Commission be in a position to establish a "competitive checklist" for the purposes of determining whether LECs deserve regulatory streamlining. As a threshold element of a competitive checklist the Commission must eliminate all regulatory subsidies for incumbent LECs. The core focus of a competitive checklist must be to mitigate anticompetitive harm to new entrants and to ensure the competitive availability of LEC bottleneck facilities on just, reasonable and nondiscriminatory rates, terms and conditions to rival local exchange service providers.


The Commission must also reject the Notice's proposals to declare incumbent LECs non-dominant and to extend streamlined price cap regulation to them as contrary to the public interest. While incumbent LECs continue to control the lion's share of the local exchange market and facilities-based competition is forestalled, they do not deserve non-dominant status. Downward pricing flexibility and other proposed amendments to the existing price cap plan will undermine the very pro-competitive purpose of the price cap system of regulation while encouraging LECs to engage in discriminatory and anticompetitive conduct.

The Commission must, therefore, defer consideration of the Notice's proposals to reduce price cap regulation of incumbent LECs until a complete roadmap for local exchange competition has been established. Only after having completed a thorough and expeditious inquiry into competition in the local exchange market, upon which a

competitive paradigm has been established, will the Commission be able to visualize a pro-competitive template for facilities-based competition in the local exchange market.

Respectfully submitted,

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